933 F.2d 1013

Unpublished Disposition

NOTICE: Ninth Circuit Rule 36-3 provides that dispositions other than opinions or orders designated for publication are not precedential and should not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.

The GOVERNMENT OF PERU, Plaintiff-Appellant,
v.
Lawrence W. WENDT, David Swetnam, Jacqueline Swetnam, George Gelsebach, Oman Gaspar, Ronald Stenman, and 352 Peruvian Artifacts, Robert Johnson, as Executor of the Estate of Benjamin Johnson, Defendants-Appellees.

No. 90-55521.

United States Court of Appeals, Ninth Circuit.

Submitted May 6, 1991.*
Decided May 15, 1991.

Before BEEZER, CYNTHIA HOLCOMB HALL and TROTT, Circuit Judges.

MEMORANDUM**

The government of Peru brought this action against Benjamin Johnson claiming ownership of nearly one hundred artifacts[1] seized from Johnson by the United States Customs Service. After a bench trial, the district court rendered judgment in favor of Johnson because Peru failed to prove the artifacts originated in modern-day Peru. Peru appeals. We affirm.

The late Benjamin Johnson[2] was an art dealer and collector. Johnson acquired the relevant artifacts in good faith on the open market. Peru claims that the artifacts were excavated from archeological sites within modern-day Peru. Peru also claims that, beginning in 1929, Peruvian law established Peru's ownership of the artifacts.

Peru relied on the testimony of its expert, Dr. Francisco Iriarte, to prove that the artifacts came from modern-day Peru. Dr. Iriarte admitted that ancient Peruvian culture spanned not only modern-day Peru, but also areas that now are within the borders of Bolivia and Ecuador. Many of the population centers that were part of ancient Peruvian civilization, and from which artifacts have been taken, are within those countries.

Peru does not deny appellee's assertion that Dr. Iriarte, an employee of the Peruvian government, spent only one hour examining the artifacts. Nor does Peru deny that Dr. Iriarte used the phrase "from Peru" to encompass ancient Peru, which spanned territory that today includes parts of several countries. The district court found that Dr. Iriarte

is knowledgeable in his field and honest in his beliefs. He also has a genuine interest in helping his country recover artifacts that are such an important part of its patrimony, and this desire necessarily plays a part in his conclusions as to the origins of the objects at issue. In some instances, he admitted that an item may have come from Ecuador or Columbia or

Mexico or even Polynesia, but nonetheless retained the opinion that it had been found in a particular area of Peru, due to its similarity to other objects taken from that site. Because of the many other possibilities, this court cannot base a finding of ownership upon such subjective conclusions.

7 Government of Peru v. Johnson, 720 F.Supp. 810, 812 (C.D.Cal.1989).

8 Peru contends that it was clear error for the district court to reject completely the testimony of Dr. Iriarte without stating a separate factual finding with respect to each of the ninety or so artifacts. Peru's position has no support, and we reject it.

9 Findings of fact cannot be set aside unless clearly erroneous. Fed.R.Civ.P. 52(a).

10 If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

11 Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985). When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings. Id. at 575.

12 Peru had the burden of proving that each of the objects came from within the boundaries of modern-day Peru. The testimony of Dr. Iriarte was the only evidence offered to carry that burden. Peru incorrectly assumes that Dr. Iriarte's testimony must be accepted where it was uncontradicted. Cross-examination by the defense showed that some of Dr. Iriarte's testimony was contradictory, and the defense argued that all of the testimony was inconclusive. The district court determined that Dr. Iriarte's conclusions were "subjective" and refused to credit them. The court's credibility determination is not clearly erroneous merely because it was stated once in reference to Dr. Iriarte's entire testimony, rather than ninety times in reference to each artifact.

CONCLUSION

13 Under any theory of recovery, Peru had to prove the artifacts originated in modern-day Peru. The district court's finding that Peru failed to carry that burden was not clearly erroneous.

14 AFFIRMED.

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[*] The panel unanimously finds this case suitable for decision without oral argument. Fed.R.App.P. 34(a); Circuit Court Rule 34-4

[**] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir.R. 36-3

[1] The district court's opinion refers to 89 objects, see Government of Peru v. Johnson, 720 F.Supp. 810, 811 (C.D.Cal.1989), while appellee refers in his brief to 93 objects

[2] On October 2, 1990, this court granted appellee's motion under Fed.R.App.P. 43(a) to substitute Robert Johnson as executor of Benjamin Johnson's estate